Apology Legislation - Policy Report 2007

Charlottetown, Prince Edward Island September 9-13, 2007
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Introduction

[1] In the fall of 2006, the Steering Committee of the Civil Section of the Uniform Law Conference of Canada adopted a project to prepare a draft Uniform Apology Act for presentation to the 2007 Annual Meeting. A working group was established with the following members: Janice Brown of Nova Scotia, Douglas Kropp of the Government of Canada, John Gregory of Ontario, Averie McNary of Alberta, Marie Riendeau of the Government of Canada, Madeleine Robertson of Saskatchewan, and Russell Getz of British Columbia as Chair.

[2] This project was inspired by the interest in the British Columbia Apology Act of 2006[1]. The British Columbia statute provides that an apology is not admissible in civil proceedings for the purpose of proving liability and that an apology is not an admission of liability. After the

adoption of this project, Saskatchewan enacted virtually identical provisions respecting apologies in the Evidence Amendment Act, 2007[2].

[3] This paper discusses the impetus for apology legislation, the present legal position of apologies, and the merits of such legislation. It concludes that apology legislation would be highly beneficial, and recommends a uniform apology statute modelled on the British Columbia and Saskatchewan enactments.

Origin and Context

[4] The Apology Act of British Columbia and the Evidence Amendment Act, 2007 of Saskatchewan have their origins in law reform and civil justice reform efforts to improve the means available to people for resolving civil disputes. Research in pursuit of this work has indicated the benefits of apologies in resolving disputes, the real or perceived ambiguity respecting the legal effect of apologies, and legislative initiatives on the topic in a number of American and Australian jurisdictions.

UNIFORM APOLOGY ACT

[5] Formal definitions of the term "apology" and substantive examinations of apologies in human interaction concur that two related elements are essential for something to be an apology: an acknowledgment or admission of responsibility for fault or wrongdoing; and an expression of regret or remorse for that fault or wrongdoing.[3]

[6] The British Columbia Ministry of Attorney General's Discussion Paper on Apology Legislation[4] referred to the findings of the literature[5] on apologies. Apologies were found to have a beneficial and indeed essential place in moral life generally, and in personal reconciliation in particular. They also have a potential place in the resolution of legal disputes.

The Present Legal Position of Apologies

[7] Apologies are of course recognized in civil law as relevant in the assessment of damages. In the law of defamation, an apology and retraction may mitigate damages[6]. Apologies can also be relevant in criminal law with respect to sentencing, and in the law of contempt.

[8] This paper looks at apologies made prior to the determination of a dispute, rather than apologies' role in fixing remedies once liability has been decided. It is arguable that certain protections are already afforded under current law to an apology if it were in a statement made by a party to a legal dispute. An apology could be protected at common law from being admitted into evidence[7] if it were a statement made in the course of certain communications protected by the law of privilege, as part of "without prejudice" communications between parties relating to settlement negotiations. An apology made in an informal process such as mediation might also be protected pursuant to legislation or a regulation.[8]

[9] But in the absence of one of these limited protections, the perceived uncertainty about the legal consequences of an apology can lead people to be reluctant to apologize for fear that an apology might be taken as an admission of liability that could void an insurance policy, encourage a lawsuit, or result in a court holding the apologizer liable.

[10] There may be reason to think that the potentially negative legal consequences of an apology are not as severe as some people allege. Catherine Morris has written that a review of case law indicates that although apologies are admitted as evidence, courts carefully consider all other evidence, credibility of witnesses, and the intent of the persons making apologies before accepting them as admissions of liability.9 However, despite the caution of courts and the possibility that apologies

may discourage lawsuits and encourage resolution, nevertheless, given the lack of certainty respecting the legal consequences of apologies, and the overriding concern with protecting the position of their client, it is understandable that counsel should be reluctant to advise their clients to apologize. As Catherine Morris states:[10]

lawyers will not be persuaded by anecdotal or statistical evidence that sincere apologies may facilitate earlier and lower settlements against defendants. Lawyers are interested in protecting the interests of their particular client who is not a statistic or someone else's happy ending story.

If the legal consequences of apologies are not certain, what ought those consequences to be?

Protecting Apologies from Being Used to Establish Liability

[11] What ought to be the place of apologies as a means of reconciling people and resolving disputes? In civil law, this question inevitably involves the effect of apologies on the civil liability of those who offer them. Limiting such an effect would have to be done by legislation, such as that mentioned above that makes apologies inadmissible for the purpose of establishing liability.

[12] Before looking at the arguments for and against apology legislation, we should consider the scope and nature of the protection in such legislation. Two models of apology legislation may be distinguished. The first protects what might be termed a full apology, consisting of both an expression of sympathy and an admission or acknowledgment of fault or wrongdoing. The second extends to an expression of sympathy only, but not to an admission or acknowledgment of fault or wrongdoing.

[13] The following discussion considers apology legislation in which a full apology is protected. The reasons for this are: that the definition of an apology in such legislation is consistent with the definition and understanding of an apology in general usage; that the broader definition is more consistent with the understanding of an apology in current law; that the arguments for and against apology legislation per se are more likely to be better tested by considering apologies as broadly defined; and that the two instances of existing Canadian apology legislation are of this type. expanded after the general discussion.) (The policy arguments on this point are expanded after general discussion.)

Arguments For and Against Apology Legislation

[14] The reasons that are advanced in favour of apology legislation may be characterized as legal, social, and moral: to encourage timely, less litigious modes of resolving legal disputes; to encourage inter-personal reconciliation; and to encourage personal responsibility. The British Columbia Discussion Paper on Apology Legislation summarized these reasons as follows:

a) To avoid litigation and encourage the early and cost-effective resolution of disputes;
b) To encourage natural, open and direct dialogue between people after injuries; and
c) To encourage people to engage in the moral and humane act of apologizing after having injured another and to take responsibility for their actions.[11]

[15] These three reasons are of course interrelated in a practical sense, in that encouraging people to take responsibility and to apologize encourages people to be reconciled with one another, which in turn encourages people to resolve their disputes, which lessens litigation.

[16] The first point in support of apology legislation is that people naturally often want to apologize and to receive apologies, and that the law should support, rather than frustrate, this very human inclination, need, and moral sensibility.

[17] In his article "The Role of Apology in Tort Law"12 Daniel W. Shuman discusses the growing recognition of the importance of apologies for personal healing and wellbeing, as well as its central place in faith teachings and philosophy. He indicates in particular the potential benefits that apologies could bring to tort law, where purely money damages are often inadequate to fully compensate people for non-pecuniary loss and suffering. An apology can be important addition to monetary damages in compensating for intangible loss, which can be the largest element of a tort damage award.[13]

[18] The Discussion Paper referred to documented evidence of the effect of apologies in medical malpractice litigation.[14] The data are striking.

[19] A 1994 study of patients and the families who had filed medical malpractice suits indicated that 37% of those interviewed said that an explanation and apology were more important than monetary compensation, and that they might not have filed suits had they been given an explanation and apology.[15]

[20] In seventeen years after adopting a policy of full disclosure and apology, the Veterans Affairs Medical Center in Lexington, Kentucky, only three cases have gone to trial, with an average settlement of $16,000, as compared with a veterans' affairs facilities' national average of $98,000. Cases also resolve within two to four months, as distinct from the national average of two to four years.[16]

[21] Since 2002, hospitals in the University of Michigan's Health System have been encouraged to apologize for mistakes. Since then annual lawyers' fees dropped from three million dollars to one million dollars, and malpractice suits and notices of intent to sue have dropped from 262 in 2001 to approximately 130 per year.[17]

[22] The value of apologies and the need to allow them to be offered without fear of liability was described by the British Columbia Ombudsman, Howard Kushner:

I have observed that a sincerely offered apology will often satisfy a person who has a complaint....I have also heard a range of reasons from senior public officials why an apology is not possible.[18]

[23] Mr. Kushner said that officials most frequently report that they have received legal advice not to apologize for fear that an apology may be considered an acknowledgment of liability in any ensuing litigation.[19]

[24] Some critics of apology legislation say that it "might preclude evidence of admissions that some plaintiffs might need to prove their case."[20]

However, protecting apologies from being used to establish liability does not constitute a departure in legal policy from that applicable to other uses of apologies and measures designed to encourage resolution of disputes. As noted above, apologies presently receive protection as part of `without prejudice' statements in settlement negotiations, in mediation, and pursuant to certain statutory provisions, and are not admitted into evidence.

[25] If it is justifiable as a matter of legal policy to foster the resolution of disputes by protecting apologies made in these circumstances, should not

an apology made outside those presently protected categories also be protected? [21]The distinction is artificial.

[26] In any event, the role of an apology in proving liability should not be overstated. Putting plaintiffs to the proof of their case on the facts is not an undue hardship. An apology, or its absence, will rarely be determinative.

[27] Two other related arguments against apology legislation are that it could encourage insincere, strategic apologies that could work against the interests of plaintiffs who may be naïve; and that an apology may create an emotional vulnerability in some people, rendering them susceptible to accepting inappropriately low settlements.[22]

[28] To begin with, the same criticisms could be made of apologies protected by our present law, but we give the protection because of the perceived value of open, low-risk negotiations. Here we are looking at merely extending the protection beyond the limits of formal dispute-resolution processes.

[29] Further, apology legislation does not prevent anyone from suing, so it deprives no one of a legal remedy. If the victim does not believe the wrong-doer is sincere, this may provoke litigiousness rather than reduce it. In any event, nothing in the proposed legislation says that an apology will not be accompanied by an offer of money. Certainly, early offers of compensation were an important part of the above noted successes in reducing litigation in American hospitals.

[30] As with apologies that are presently protected, knowledgeable and responsible legal advice would remain pertinent so that an injured person understands the legal status of an offered apology and of his or her response to it.

[31] Finally, the criticism presumes that the only "appropriate" result for the injured person is a money award. On the contrary, both research and common sense demonstrate that what victims need to be made whole may not be measurable in money. A restored human relationship may be exactly the appropriate result. It should also be noted that, depending on the circumstances, other forms of non-monetary response, such as a sincere commitment to change behaviour, a practice, or a policy, could lead to a suitable outcome for the victim.

[32] Some critics allege that excluding apologies from evidence would tend to drain apologies of their moral force and value.[23] If a person is truly sorry, and if an apology is to be meaningful, then the person apologizing should be prepared to accept the consequences, including the legal or material consequences.

[33] In reply, it may first be noted that this argument may be advanced equally against apologies that are presently protected from admission into evidence.

[34] Second, in an imperfect world (that is, the world our laws and legal system have been developed to deal with), it is very difficult to judge the moral force of an apology in the abstract, to say that a "high risk" apology is more morally meaningful than one with low legal risk. In general, apologies are morally desirable. Apology legislation encourages apologies that would not be given at all without it. Arguably the law should let the victims judge their moral (and legal) worth.

[35] Third, the sincerity, and therefore the persuasiveness (and moral worth, perhaps), of an apology might reasonably be doubted by some if not accompanied by an offer of adequate material compensation for tangible loss or injury, at least where the facts suggest liability. As noted

earlier, the two often go together.

[36] Last, as Daniel Shuman has said[24], an apology is a form of compensation and an irreplaceable benefit for many injured persons that we cannot ignore if we are committed to the wellbeing of these people. This is surely a moral consideration of fundamental importance.

[37] It has also been suggested that in fact the absence of apology legislation may well work to the disadvantage of people who, for reasons of gender, culture or religion, may be more prone to apologize than are other people.[25]

[38] While some of the criticisms of apology legislation may be reasonable bases of concern, they are better taken as counsels of caution for injured persons and their lawyers. Apology legislation is consistent with policies to broaden and improve the means for resolving civil disputes through alternatives to litigation; and to encourage less adversarial modes, such as mediation and dialogue between parties. The ability to apologize is part of this, and to secure the legal, social, and moral benefits of apologies, apology legislation is needed.

The Scope of Protection: Expressions of Sympathy and Acknowledgments of Fault

[39] The British Columbia and Saskatchewan legislation include protection of apologies that acknowledge fault or wrongdoing. However, many of the enactments in the United States and Australia protect only expressions of sympathy, and are either silent as to whether this may include acknowledgement of fault, or expressly exclude acknowledgment of fault from protection.

[40] This sympathy-only model is undoubtedly a more cautious departure

from current law. It might also might be said that, prima facie, such legislation yields less risk of frustrating a meritorious claim at trial, with a possible adverse effect on confidence in the courts, should a person who has admitted wrongdoing be found not to be liable because his or her apology was not admissible (under a broader statute). However, the prospect of such an outcome is remote. In the unlikely event that a matter proceeded to trial following a full apology, there is, as we have seen, reason to doubt that under current law, an apology would be easily admitted in evidence to establish liability. And of course apologies made `without prejudice' in the course of settlement negotiations are not now admissible.

[41] The British Columbia Discussion Paper suggested that legislation protecting only expressions of sympathy would not be substantially different from the status quo.[26]

[42] A related problem arising from the limited model is the potential that some may be misled respecting whether a fault admitting apology may be used against them.[27] In practice it will be very difficult to know for sure whether an expression of regret has moved from sympathy to admission of fault. The uncertainty will lead lawyers to advise their clients to stay silent or to draft apologies in such legalistic and artificial language[28] that the victim will see them as insincere or calculating. This is likely to exacerbate both suffering and discord.

[43] There is no good policy reason to create this new risk in trying to resolve the current one. The legislation should therefore provide for the broad form of apology. It was also noted within the working group that there may be jurisdictions that, for greater certainty, may find it appropriate to specify that prefatory statements of fact associated with the apology are included in the definition.

The Scope of Application: Negligence and Intention

[44] In addition to the type of statements that are protected, apology legislation may be distinguished according to scope of wrongdoing to which it applies. The British

Columbia and Saskatchewan legislation is not limited to certain types of civil liability. By contrast, almost all the American enactments apply only to medical malpractice or accidents, or both. Similarly, in Australia, apology legislation is limited to personal injury claims, negligence, or torts generally.

[45] Are there compelling reasons of policy or principle for restricting the scope of apology legislation in this way? With respect to unintentional wrongdoing, it is difficult to see why apology legislation ought to be restricted to certain kinds of negligence, such as medical malpractice, and not to others. Neither the type of fault involved nor the scope of the harm that it causes supports such a distinction. The injured persons are not more vulnerable, nor the instigators of harm less apologetic, in one case than in another.

[46] With respect to intentional wrongdoing, the British Columbia Discussion Paper stated that the same kinds of public policy reasons for and against apology legislation "would seem to apply whether or not intentional acts are included within the scope of the legislation"[29]. Indeed after an intentional act, "the moral and psychological need for an apology" is probably greater than after an unintentional act.

[47] The Discussion Paper noted arguments that protecting an apology for an intentional act might have; potential for increased injury to an injured party and an adverse effect on public confidence.[30] However, it concluded by noting two factors that support the practicality of including intentional

wrongdoing within the scope of apology legislation:

...the likelihood that a person would admit liability in an apology and that the matter would not settle would seem to be remote; and including an exception for intentional acts could give rise to litigation over whether or not an act was intentional, thus undermining a primary purpose of the legislation.[31]

[48] Here as with negligent torts, the impact on a trial of excluding an apology is likely to be minimal. The facts will speak for themselves.

[49] The practical problems with excluding intentional wrongs are important. The wrongdoer may offer an apology that does not admit the action was intentional. It may be more comfortable to pass over that question in silence. The victim may prefer such an apology, which may well be sincere, to no apology. Would such an apology satisfy legislation that did not apply to intentional harm? Would the victim have to prove not only cause but intention, and risk diverting trial time and energy to the collateral question of admitting the apology? The Discussion Paper's concern over litigation on that point is legitimate.

[50] Apology legislation of the kind discussed here does not touch the effect of an apology on a criminal prosecution, though admitting it in such a case could raise issues of hearsay and self-incrimination. But even after someone has been convicted, the victim may be assisted by an apology. Why discourage it by the threat of civil liability? In conclusion, it would seem that an inclusive scope of application is most consistent with the arguments favouring apology legislation.

Canadian Apology Legislation

[51] As indicated above, apology legislation has been enacted in two

Canadian jurisdictions: British Columbia and Saskatchewan. The British Columbia legislation is in the form of a standalone statute, the Apology Act, whereas the Saskatchewan legislation is in the form of an amendment to the Saskatchewan Evidence Act. In substance however, both statutes are virtually identical. In both, an apology encompasses statements admitting or implying an admission of wrongdoing, in addition to expressions of sympathy or regret. As well, both enactments have a broad scope of application, extending to any matter.

[52] The provisions of both enactments make the protection accorded to apologies clear by providing, first, that an apology is not an admission of legal fault or liability, express or implied; second, that an apology is not relevant in determining fault or liability; and third, that an apology is not admissible in evidence to establish liability.

[53] Both enactments have two other provisions important to the efficacy of the legislation: an apology cannot be used as confirmation of a cause of action in order to extend a limitation period, and an apology cannot be regarded as an admission of liability for the purpose of voiding an insurance policy. In other words, two additional disincentives to apologizing are expressly removed.

[54] Lastly, both enactments accord with apology legislation in other jurisdictions by protecting apologies from being used to establish liability, but do not protect them from being used in the assessment of damages. Whether they would aggravate or diminish damages may depend on the particular case.

A Uniform Apology Act

[55] This paper has demonstrated the benefits of apology legislation in improving the satisfaction of injured parties, and of wrongdoers who are

more able to do the right thing.

Torts are not necessarily confined within provincial or territorial borders. People may do or suffer harm away from home. The human and legal consequences should be predictable across the country. Thus a harmonized legal approach would be beneficial.

[56] We conclude that uniform apology legislation is desirable, and that the British Columbia and Saskatchewan apology legislation provide a sound statutory model for a Uniform Apology Act. Jurisdictions may enact the Uniform Apology Act as a standalone statute or as part of their Evidence Acts or in another suitable statutory framework.[32]

[57] Attached is a draft Uniform Apology Act for the consideration of delegates if the recommendations of this paper are accepted.

FOOTNOTES:

1. S.B.C. 2006, c.19

2. S.S. 2007, c.24

3. Webster's Ninth New Collegiate Dictionary (Merriam-Webster Inc., 1989)

4. British Columbia Ministry of Attorney General, Discussion Paper on Apology Legislation (Victoria, British Columbia, January, 2006)

5. Cohen, Jonathan R., "Legislating Apology: The Pros and Cons", (2002) 70 University of Cincinnati Law Review 819; Cohen, Jonathan R., "Advising Clients to Apologize", (1999) 72 Southern California Law Review, 1009; Alter, Susan, "Apologizing for Serious Wrongdoing: Social, Psychological

and Legal Considerations", Law Commission of Canada, 1999; Shuman, Daniel W., "The Role of Apology in Tort Law', (2000) 83 Judicature 180; Peterson, Jan Eric, "Why Not Say `I'm Sorry', Washington State Bar News, May, 2001.

6. Libel and Slander Act, R.S.B.C. 1996, c.263, sections 6 and 7.

7. An apology might also be inadmissible under current law if it were held irrelevant or unduly prejudicial.

8. E.g., Notice to Mediate (General) Regulation, B.C. Reg. 4/2001 (a regulation pursuant to the Law and Equity Act, R.S.B.C. 1996, c. 253); Police Act, R.S.B.C. 1996, c. 367, section 54.1

9. Catherine Morris, "Legal Consequences of Apologies in Canada", Draft Working Paper presented at a workshop on "Apologies, Non-Apologies and Conflict Resolution", October 3, 2003, at the University of Victoria.
10 Ibid. , p.5

11. Op. cit., p. 4

12. (2000) 83 Judicature 180.

13. Ibid., p.182

14. B.C. Discussion Paper, op. cit., p. 2

15. Van Dusen, Virgil and Spies, Alan, "Professional Apology: Dilemma or Opportunity", American Journal of Pharmaceutical Education 2003; 67 (4) Article 14, p.3

16. Op. cit., p.2; "Why Sorry Works! Overview of the Sorry Works Program

for the Medical Malpractice Crisis",
www.victims&families.com/sorry.phtml

17. Associated Press, `Doctors Urged to Apologize for Mistakes; Softer Approach Aims to Reduce Malpractice Lawsuits", November 11, 2004.

18. British Columbia Office of the Ombudsman, The Power of an Apology: Removing the Legal Barriers, Special Report 27 to the Legislative Assembly of British Columbia (Victoria, British Columbia, February, 2006) at p.1.

19. Ibid.

20. Morris, op. cit., p.10

21. Cohen, "Advising Clients to Apologize", op. cit., at pp. 1061-1064.

22. Lee Taft, "Apology Subverted", Yale Law Journal (2000) 109.

23. Taft, op. cit.

24. Shuman, op. cit., p.182.

25. Morris, op. cit., p.9

26. B.C. Discussion Paper, op. cit., p.5

27. Ibid.

28. Ibid.

29. Ibid.

30. Ibid., p.6

31. Ibid.

32. This should be made clear in the resolution of the Civil Section resulting from this report.